

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 98-0304 ST
STATE GROSS RETAIL TAX
For Years 1995, 1996, AND 1997**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales and Use Tax-Publication

Authority: IC § 6-2.5-3-, IC § 6-2.5-5-17, 45 IAC 2.2-5-26, *Emmis Publishing Corporation v. Indiana Department of Revenue*, 612 N.E.2d 614 (Ind. Tax Court, 1993.)

Taxpayer protests the assessment of use tax on its publication.

II. Sales and Use Tax- Equipment Rental

Authority: 45 IAC 2.2-4-27

Taxpayer protests the assessment of use tax on the equipment rental portion of a contract for service rendered by an outside contractor.

STATEMENT OF FACTS

Taxpayer is an electric utility cooperative organized as a beneficial society under 501(c) (2) of the Internal Revenue Code. Each month Taxpayer purchases a publication and distributes it to each of its members. Taxpayer also contracts with an outside contractor for tree trimming services. After a routine audit, the Indiana Department of Revenue assessed additional use tax on Taxpayer's use of the publication and on the equipment rental portion of the invoices for the tree trimming services. Taxpayer protests these assessments.

I. Sales and Use Tax-Publication

DISCUSSION

IC § 6-2.5-3-2 imposes the gross retail tax on “the storage, use, or consumption of tangible personal property in Indiana, if the property was acquired in a retail transaction.” Taxpayer purchases a publication and distributes it to its members. This use is generally subject to the gross retail tax. Taxpayer contends, however, that the publication is a newspaper and therefore qualifies for exemption from the gross retail tax pursuant to IC § 6-2.5-5-17. The auditor for the Indiana Department of Revenue classified the publication as a magazine. Therefore, it would not qualify for the newspaper exemption to the gross retail tax. The issue to be determined is whether the publication is a newspaper qualifying for exemption or a magazine subject to tax.

The Indiana Administrative Code provides clarification of the newspaper exemption at 45 IAC 2.2-5-26 as follows:

- (a) General Rule. In general, sales of all publications irrespective of format are taxable. The exemption provided by this rule is limited to sales of newspapers.
- (b) (b) Application of the general rule. For purposes of [sales] tax, the term “newspaper” means only those publications which are:
 - (1) commonly understood to be newspapers;
 - (2) published for the dissemination of news of importance and of current interest to the general public, general news of the day, and information of current events;
 - (3) circulated among the general public;
 - (4) published at stated short intervals;
 - (5) entered or are qualified to be admitted and entered as second class mail matter at a post office in the county where published; and
 - (6) printed for resale and are sold.
- (c) Publications which are primarily devoted to matters of specialized interest such as business, political, religious, or sporting matters may qualify for exemption if they also satisfy the criteria listed in subsection 26 of this rule [subsection (b)].
- (d) Magazines, periodicals, journals, bulletins, advertising supplements, handbills, circulars, or the like are not newspapers until distributed as a part of a publication which is a newspaper within the meaning of this rule [45 IAC 2.2].
 - (1) Magazines are not construed to be newspapers. The retail sales of all magazines and periodicals are subject to sales tax. The sale of magazines by subscription is subject to sales tax without regard to the price of a single copy, and sales tax without regard to the price of a single copy, and sales tax must be collected by the seller from the person who subscribes to the magazine on the full subscription price.

- (2) For purposes of [sales] tax, the term ‘newspaper’ shall include advertising inserts. Advertising inserts shall mean only those publications which are:
- (A)(i) produced for a person by a private printer and delivered to the newspaper publishers, or
 - (ii) produced and printed by a newspaper publisher, or
 - (iii) produced and printed by a person and delivered to the newspaper publisher, and
 - (B) inserted by the newspaper publisher into the newspapers and distributed along with the newspapers.
- Any distribution not meeting the above test does not qualify for the newspaper insert exemption. Examples of items distributed along with a newspaper that do not qualify for the exemption include: gum, shampoo, and detergent samples.
- (e) Publications issued monthly, bimonthly or at longer or irregular intervals are generally not considered to be newspapers.
 - (f) Racing forms and tip sheets are not newspapers.
 - (g) A preponderance of advertising, lack of authorization to carry legal advertising, or lack of a masthead setting forth the publisher, editor, circulation, and place of publication are characteristics of publications other than newspapers.

The Tax Court of Indiana considered the issue of whether or not a publication qualifies as a newspaper in *Emmis Publishing Corporation v. Indiana Department of Revenue*, 612 N.E.2d 614 (Ind. Tax Court, 1993.) The court applied the foregoing regulation concerning the newspaper exemption to the case at bar. It stated that pursuant to the regulation, any publication must fulfill the six requirements of subsection (b) to be considered a newspaper.

The first requirement of subsection (b) is that the publication must be commonly understood to be a newspaper. The publication is very similar to publications commonly perceived as magazines which are sent to members of beneficial societies. Publication contains no third party advertising and no information or solicitation for the placement of ads by its readers. Taxpayer’s publication does not meet the test of being commonly understood to be a newspaper since several newspaper services are not present or offered by it.

The second requirement for consideration as a newspaper is that the publication must be “published for the dissemination of news of importance and of current interest to the general public, general news of the day, and information of current events.” Taxpayer’s publication does offer information on many aspects of life. The information is all tailored, however, to the limited and common interests of members of Taxpayer’s organization. It has very little general news of the day or current events. Each issue presented for the Hearing Officer’s perusal had one to three “news” articles. These articles were always tailored specifically to be of

interest to the members of Taxpayer's electrical cooperative rather than the general public. Each publication had only one editorial that was specifically geared to the interests of Taxpayer's members. Taxpayer's publication does not meet the requirement of disseminating news and current events of interest to the general public. For this reason, Taxpayer's publication does not qualify for the newspaper exemption from the gross retail tax.

Next, to be considered a newspaper, the publication must be circulated among the general public. This publication is automatically mailed each month to all the members of Taxpayer's electrical cooperative. This is the primary means of circulation. Members of the general public, if they knew of the offer and were interested, could subscribe to the publication. This is not effectively publicized, however, and there is no evidence that very many people actually pay the subscription rate to obtain the publication. The publication does not circulate among the general public.

Publications that are newspapers are published at short intervals. Most newspapers are published daily or weekly. Further in the regulation at subsection (e), the regulation clearly states that "publications issued monthly. . . are not generally considered to be newspapers." This publication is issued monthly. This publication does qualify to be mailed second class.

The final requirement is that the newspaper be "printed for resale and are sold." As discussed earlier, this publication is offered for sale by subscription to persons who are not members of Taxpayer's electrical cooperative.

Taxpayer's publication does not meet all of the regulatory requirements to be considered a newspaper exempt from the gross retail tax.

In the past, the Indiana Department of Revenue has allowed Taxpayer's publication exemption from the gross retail tax as a newspaper. Since the Indiana Department of Revenue is now changing its determination, the imposition of the gross retail tax on Taxpayer's publication will be prospective only.

FINDING

Taxpayer's protest is sustained as to the audit period. As of the date of publication of this Letter of Findings, Taxpayer's publications will be required to remit the applicable gross retail tax.

II. Sales and Use Tax- Equipment Rental

DISCUSSION

Use taxes were assessed on the equipment rental portion of a contract for tree trimming services provided by an outside contractor. The invoices for these services contained a breakdown of the charges, including separate charges for labor and equipment.

Tax was assessed based on 45 IAC 2.2-4-27(d)(3)(C), which states:

When tangible personal property is rented or leased together with the service of an operator, the gross retail tax or use tax is imposed on the property rentals. The tax is not imposed upon the charges for the operator's services, provided such charges are separately stated on the invoice rendered by the lessor to the lessee.

Taxpayer claims an exemption based on 45 IAC 2.2-4-27(d)(3)(B), which states:

The rental of tangible personal property together with an operator as part of a contract to perform a specific job in a manner to be determined by the owner of the property or the operator shall be considered the performance of a service rather than a rental or lease provided the lessee cannot exercise control over such property and operator.

The company taxpayer contracted with provided invoices breaking out the charges for equipment and labor, but performed the work independently of the taxpayer's control. Based on these invoices and the basic principle behind the regulation's subsections, the assessment against the equipment was improperly made.

FINDING

Taxpayer protest is sustained.